No. 08-1100

In the Supreme Court of the United States

ANTOINETTE PIRANT, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the time petitioner spent putting on and removing her work clothing was "preliminary" and "postliminary" to her principal work activities under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, and thus did not count toward the hours-of-service requirement for eligibility under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*

2. Whether the court of appeals correctly concluded that petitioner was not entitled to count toward the FMLA hours-of-service requirement a period during which she alleges she was wrongfully suspended, even though she did not file a timely challenge to the suspension.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 542 F.3d 202. The opinion of the district court (Pet. App. 15a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2008. A petition for rehearing was denied on December 3, 2007 (Pet. App. 56a-58a). The petition for a writ of certiorari was filed on March 3, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, permits an "eligible employee" of a covered employer to take leave for, among

other things, "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. 2612(a)(1). To be eligible for FMLA coverage, an employee must have worked for a covered employer for at least 1250 hours during the previous 12 months. 29 U.S.C. 2611(2)(A). Whether an employee has satisfied the statutory hours-of-service requirement is determined by reference to the principles established under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, for determining compensable hours of work. See 29 U.S.C. 2611(2)(C) (citing 29 U.S.C. 207); 29 C.F.R. 825.110(c).

In an early case interpreting the FLSA, this Court held that the time employees spent on "certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls," was compensable under the statute. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-693 (1946). Congress responded to *Anderson* by enacting the Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (29 U.S.C. 251 *et seq.*), which specifies that certain activities performed before or after the workday are not compensable. 29 U.S.C. 254(a)(2); see *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 26-28 (2005). The Portal-to-Portal Act provides that an employer need not compensate an employee for "activities which are preliminary to or postliminary to [the employee's] principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a)(2).

In regulations promulgated shortly after enactment of the Portal-to-Portal Act, the Department of Labor (DOL) has made clear that "changing clothes" and

"washing up," when performed "under the conditions normally present," are considered noncompensable "preliminary" or "postliminary" activities. 29 C.F.R. 790.7(g). The regulations also provide, however, that changing clothes is compensable if it is an "integral" part of the employee's performance of her principal work activity or activities: "If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity." 29 C.F.R. 790.8(c) (footnote omitted). The regulations explain that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) n.65. But "[o]n the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity." 29 C.F.R. 790.8(c).

2. Petitioner worked as a mail handler for the United States Postal Service from 1993 to 2002. During that time she had several unexcused absences from work for which she received various disciplinary sanctions, including multiple suspensions. In March 2000, she received a year-long suspension for poor attendance. She returned to work in March 2001 under a "Last Chance Agreement," pursuant to which she was required to maintain satisfactory attendance, including no more than three unscheduled absences and no absence without leave. Pet. App. 4a, 17a.

After she returned to work, petitioner had several additional unscheduled absences. In September 2001,

she was notified that she would be terminated for violating the Last Chance Agreement. The following month, the Postal Service placed petitioner's removal in abeyance for 45 days, specifying that she "[m]ust not have any further unsched[uled] absences" and explaining that even if she maintained perfect attendance, she could still be removed at the end of the 45-day period. On December 5, 2001, petitioner called in an unscheduled absence three hours before her shift and did not return to work until December 7, 2001. On January 4, 2002, the Postal Service terminated petitioner's employment. Pet. App. 4a-6a, 17a-18a.

3. Petitioner sued the Postal Service, alleging that it violated the FMLA by terminating her for missing work on December 6, 2001. Petitioner claimed that she had missed work on that date because of a serious health condition, namely, osteoarthritis in her knee. Pet. App. 6a, 18a.

The district court granted summary judgment for the Postal Service. Pet. App. 15a-34a. The court concluded that petitioner was ineligible for FMLA leave because her payroll records showed that she had fallen 1.2 hours short of the 1250 hours of service over the last 12 months required for FMLA eligibility. *Id.* at 32a.

The district court rejected petitioner's argument that the Postal Service failed to count two hours on October 5, 2001, during which she had been wrongfully suspended by her supervisor. Pet. App. 29a. The court concluded that it was unnecessary to decide whether petitioner would be entitled to count those hours if they were due to a wrongful suspension, despite the fact that she did not actually work during those hours, because "there is no evidence in this case that [petitioner's] suspension was wrongful." *Ibid.*

The district court further held that petitioner was not entitled to count the time she spent each day changing into her work clothes, including a work shirt, apron, gloves, and shoes. Pet. App. 29a-31a. The court held that petitioner's clothes-changing activities were within "the range of ordinary clothes changing and showering that need not be compensated under the FLSA." *Id.* at 31a (citing *Steiner* v. *Mitchell*, 350 U.S. 247 (1956)).

4. The court of appeals affirmed. Pet. App. 1a-14a. The court of appeals agreed with the district court that petitioner was not entitled to credit for her two-hour suspension on October 5, 2001. *Id.* at 10a-11a. The court noted that petitioner had been advised of her right to file a formal grievance and a request for back pay after the incident, but did not do so until after she was terminated and the regulatory filing period had expired. The court concluded that, "[b]y failing to pursue a formal challenge to her suspension, [petitioner] has accepted that she is not entitled to either compensation or FMLA credit for the lost two hours." *Id.* at 11a.

The court of appeals also agreed with the district court that the time petitioner spent putting on and removing her work clothing was not compensable under the FLSA and thus did not count toward the FMLA's hours-of-service requirement. Pet. App. 13a. The court noted that this Court has held that activities such as changing clothes are compensable under the FLSA only "'if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded' by the Portal-to-Portal Act." *Id.* at 12a (quoting *Steiner*, 350 U.S. at 256). The court saw no basis for concluding that the time petitioner spent changing clothes before

and after her shift was "integral and indispensable" to her principal activities:

> Here, [petitioner] was not required to wear extensive and unique protective equipment, but rather only a uniform shirt, gloves and work shoes. The donning and doffing of this type of work clothing is not 'integral and indispensable' to an employee's principal activities and therefore is not compensable under the FLSA. It is, instead, akin to the showering and changing clothes 'under normal conditions' that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity.

Id. at 13a (quoting *Steiner*, 350 U.S. at 249, 256).

In its initial opinion, the court of appeals also cited and relied in part on the Second Circuit's decision in *Gorman* v. *Consolidated Edison Corp.*, 488 F.3d 586 (2007), cert. denied, 128 S. Ct. 2902 (2008), which held that donning and doffing "generic protective gear," such as "a helmet, safety glasses, and steel-toed boots," are noncompensable under the FLSA because such activities are "relatively effortless * * * preliminary tasks." *Id.* at 594 (internal quotation marks and citation omitted); see Pet. App. 61a-62a (discussing *Gorman*).

In a petition for panel rehearing, the Postal Service, supported by DOL as *amicus curiae*, requested that the court of appeals amend its opinion to remove the discussion of *Gorman*. Pet. App. 35a-42a, 43a-55a. The Postal Service's brief explained that DOL considered *Gorman*'s focus on the non-extensive and non-unique nature of the clothing at issue to be inconsistent with DOL regulations. *Id.* at 40a-41a. The Postal Service further explained that reliance on *Gorman* was unnecessary to re-

solve the case, since "[t]here was no evidence that [petitioner] was required to change clothes at work, nothing showing that she could not have done so prior to coming to work, or any other evidence that might create a genuine dispute as to whether or not the clothes-changing at issue here was 'integral and indispensable' to [petitioner's] work." *Id.* at 40a. In response to the petition, the court of appeals modified its opinion to delete the references to *Gorman*. *Id.* at 56a-58a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly concluded that there was no basis in the record from which to conclude that the time petitioner spent changing clothes before and after work should count towards the FMLA's eligibility requirement of 1250 hours of service.

For purposes of the FMLA, the computation of an employee's hours of service is governed by the FLSA. See 29 U.S.C. 2611(2)(C) (citing 29 U.S.C. 207); 29 C.F.R. 825.110(c). Under the Portal-to-Portal Act, activities such as changing clothes before or after a work shift are included in an employee's compensable hours if those activities "are an integral and indispensable part of the [employee's] principal activities." *Steiner* v. *Mitchell*, 350 U.S. 247, 249, 256 (1956).

In *Steiner*, this Court held that the time battery plant employees spent changing into and out of work clothes and bathing after their shifts was "an integral and indispensable part of the principal activity of the employment," and thus compensable under the Portal-to-Portal Act. 350 U.S. at 256. The Court explained that

"[s]afe operation" at the plant "require[d] the removal of clothing and showering at the end of the work period" and that state law and the employers' insurers required the employer to provide facilities onsite for those purposes. *Id.* at 250-251. The Court, however, distinguished such activities from "changing clothes and showering under normal conditions." *Id.* at 249; see *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 29 (2005).

The court of appeals in this case correctly held that time petitioner spent donning and doffing her work clothing was not "integral and indispensable" to her principal activities as a mail handler. See Pet. App. 11a-13a. The only evidence petitioner offered to support her contention that she should have been credited for time she spent changing clothes was a declaration stating that when she arrived at work, she "would put on a work shirt, change shoes, put on [her] apron and collect [her] gloves," spending "approximately three to five minutes at [her] locker" before she "clock[ed] in" for her shift. See Pl. Mem. in Opp. to Def. Mot. for Summ. J. 2, 9; *id.* Exh. F ¶¶ 20, 21 (Declaration of Antoinette Pirant). Petitioner presented no evidence showing that she was required to change into certain items of clothing on the premises, or otherwise showing that the time in question was anything other than time spent "changing clothes 'under normal conditions' that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity." Pet. App. 13a (quoting *Steiner*, 350 U.S. at 249).

b. Despite petitioner's arguments to the contrary (Pet. 17-19), the court of appeals' decision is consistent with DOL's interpretation of the Portal-to-Portal Act.

As petitioner notes (Pet. 17), the Postal Service, supported by DOL as *amicus curiae*, sought panel rehear-

ing because of DOL's concern that the panel's opinion as originally drafted explicitly endorsed the reasoning of *Gorman* v. *Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), cert. denied, 128 S. Ct. 2902 (2008). DOL's *amicus* brief explained that the analysis in *Gorman* incorrectly emphasized the "generic" and "minimal" nature of the clothing at issue in those cases, rather than considering whether the employee could not "perform his principal activities without putting on certain clothes," 29 C.F.R. 790.8(c), and whether "the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work," 29 C.F.R. 790.8(c) n.65. Pet. App. 51a. In response, the panel modified its opinion to eliminate any reliance on *Gorman* or its reasoning. *Id.* at 56a-58a.

The changes to the court of appeals' opinion were not merely "[c]osmetic," as petitioner asserts (Pet. 19). Although the modified opinion notes that petitioner "was not required to wear extensive and unique protective equipment," (Pet. App. 13a), the opinion does not establish that the "*kind* of protective gear and *effort* involved in wearing it" necessarily dictate whether donning and doffing time is compensable under the FLSA. Pet. 19-20. Rather, the opinion simply reflects the unremarkable proposition that the type of clothing involved here, standing alone, provided no basis for concluding that petitioner's changing was anything other than "changing clothes 'under normal conditions' that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity." Pet. App. 13a. Petitioner pointed to no other evidence that might support a finding that the time she spent changing into her work clothing was "integral and indispensable" to her principal work activi-

ties. *Steiner*, 350 U.S. at 256. The decision below is thus consistent with both the statute and DOL regulations. As DOL explained in its *amicus* brief, the agency agrees with the court of appeals' disposition of the case and its determination that the time petitioner spent changing into her work clothes was not compensable. See Pet. App. 44a, 49a-50a.

Petitioner errs in contending (Pet. 18-19, 20) that DOL regulations require compensation for the donning and doffing of any clothing that an employer requires an employee to wear. On the contrary, as petitioner herself appears to acknowledge, DOL's longstanding view is that donning and doffing time may be compensable "where the changing of clothes *on the employer's premises* is required." Pet. 18-19 (internal quotation marks and citation omitted) (emphasis added); see 29 C.F.R. 790.8(c) & n.65; see also DOL, *Wage and Hour Advisory Memorandum No. 2006-2*, at 3 <http://www.dol.gov/esa/whd/FieldBulletins/AdvisoryMemo2006_2.pdf> (donning and doffing of required work gear is compensable "only when the employer or the nature of the job mandates that it take place on the employer's premises"). Petitioner cited no evidence that she was required to change at her job site, and she cites none in her petition to this Court. See Pet. 20-21.[1]

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[1] It is also unclear what, if any, items petitioner was required to wear on the job. The evidence in the record concerning petitioner's donning and doffing activities consists of the declaration in which she states that before work she "would put on a work shirt, change shoes, put on [her] apron and collect [her gloves]." See Pl. Mem. in Opp. to Def. Mot. for Summ. J. Exh. F ¶ 20 (Declaration of Antoinette Pirant). Although petitioner contends that the courts below "unequivocally held that [petitioner] alleged she was required to wear the protective gear," Pet. 20, the matter is not free from doubt. The district court stated only that handling mail required petitioner "at most * * * to use ordinary

c. Petitioner contends (Pet. 11-22) that this Court's review is warranted to resolve a conflict among the courts of appeals about whether "the time an employee spends donning and doffing required work gear may only be counted if the gear is unique or burdensome to wear." Pet. i.

Petitioner is correct that courts of appeals have taken different approaches to the question whether donning and doffing non-unique, non-burdensome gear qualifies as "work" or as an activity that is "integral and indispensable" to an employee's principal activities. Compare *De Ascencio* v. *Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007) (donning and doffing is "work" if it is "controlled or required by the employer and pursued for the benefit of the employer," without regard to whether it requires a "sufficiently laborious *degree* of exertion"), cert. denied, 128 S. Ct. 2902 (2008), and *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 903-904 (9th Cir. 2003) (donning and doffing of non-unique protective gear such as hardhats and safety goggles may be "integral and indispensable" to an employee's principal activities, despite the "ease of donning and ubiquity of use" of the gear, but is nevertheless "noncompensable as *de minimis*"), aff'd on other grounds, 546 U.S. 21 (2005), with *Gorman*, 488 F.3d at 593 (donning and doffing "generic protective gear" such as "a helmet, safety glasses, and steel-toed boots" are not "integral" to an employee's principal activities, but are "'relatively effortless,' non-compensable, preliminary tasks") (quoting *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995)), and *Reich* v. *IBP*,

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gloves and an apron." Pet. App. 31a. The court of appeals, without citing any district court findings or record evidence, stated that petitioner was "required" to wear "a uniform shirt, gloves, and work shoes." *Id.* at 13a.

Inc., 38 F.3d 1123, 1125-1126 (10th Cir. 1994) (donning and doffing is not "work" if the gear "can easily be carried or worn to and from work and can be placed, removed, or replaced while on the move or while one's attention is focused on other things").

This case, however, is not a suitable vehicle for resolution of any tension that may exist among the courts of appeals on that question. As explained above, see pp. 8, 9-10, *supra*, the decision below does not hold that "the time an employee spends donning and doffing required work gear may only be counted if the gear is unique or burdensome to wear," Pet. i, but instead holds that, given the facts of this case, petitioner's donning and doffing activities were "akin to changing clothes 'under normal conditions' that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity," Pet. App. 13a (quoting *Steiner*, 350 U.S. at 249). That decision does not implicate the conflict in authority that petitioner raises.

Petitioner also errs in suggesting (Pet. 9, 10, 13-17) that other courts would have found her donning and doffing time to be "integral and indispensable" to her principal employment activities solely because her employer assertedly required that she wear certain items on the job. See note 1, *supra*. The cases on which petitioner relies do not support such hypothesizing. In both *Alvarez* and *De Ascencio*, the employer not only required that certain clothing or gear be worn, but also that the employees change into the gear *on the employer's premises*. *Alvarez*, 339 F.3d at 903; *De Ascencio*, 500 F.3d at 363 n.3, 372; accord *Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901, 911 (9th Cir. 2004). The analysis in those cases is thus consistent with DOL's regulations

interpreting the Portal-to-Portal Act, which provide that donning and doffing work gear may be "integral and indispensable" to an employee's principal activities where "the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) n.65. By contrast, there is no evidence in this case that petitioner was required to change on site.

2. The court of appeals also correctly held that petitioner was not entitled to FMLA credit for the two hours of time on October 5, 2001, during which she concededly did not work but alleges she was improperly instructed to "clock-out" early. Pet. App. 10a-11a.

A Postal Service Dispute Resolution Specialist investigated the "clock-out" incident and informed petitioner of her right to file a formal grievance for restoration of back pay within 15 days. Pet. App. 5a. Petitioner failed to do so until weeks after the 15-day deadline had passed. *Id.* at 6a. She did not appeal the dismissal of her grievance or file any further challenge to the two-hour suspension. *Ibid.*

As the court of appeals explained, petitioner was not entitled to FMLA credit for hours she did not work, based solely on her "unsubstantiated subjective belief that her two-hour suspension was wrongful." Pet. App. 11a. See 29 U.S.C. 207(e), 2611(2)(A)(ii), 2611(2)(C); see also *Plumley* v. *Southern Container, Inc.*, 303 F.3d 364, 370 (1st Cir. 2002) (reading Section 207(e) to include "only those hours that an employer suffers or permits an employee to do work * * * for which that employee as been hired and is being paid").

The court of appeals' decision does not conflict with the Sixth Circuit's decision in *Ricco* v. *Potter*, 377 F.3d 599 (2004). In *Ricco*, the Sixth Circuit held that where

a plaintiff had grieved her termination and obtained reinstatement with full credit for years of service and back pay, she was also entitled to FMLA credit for hours she had not worked because of her unlawful termination. *Id.* at 601, 605. By contrast, in this case, petitioner neither timely sought nor obtained any relief for her suspension. See Pet. App. 11a.

Petitioner faults the court of appeals for imposing a "contract-based precondition on [her] eligibility for relief created by a federal statute." Pet. 25. But petitioner cites no authority, and we are aware of none, holding that an FMLA plaintiff is entitled to raise a belated collateral challenge to an employment suspension in order to claim credit for hours she admittedly did not work.[2] Further review is not warranted.

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[2] Petitioner cites (Pet. 23) *Nance* v. *Goodyear Tire & Rubber Co.*, 527 F.3d 539 (6th Cir. 2008), cert. denied, 129 S. Ct. 1319 (2009), in support of the proposition that a plaintiff need not file a grievance in order to receive FMLA credit for hours during which she alleges she was wrongly prevented from working. The court in *Nance* did not, however, consider that question, having rejected the plaintiff's request for post-termination FMLA credit on the ground that the plaintiff had not been terminated, but instead had resigned without notice. *Id.* at 557-558.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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